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Hearsay testimony could bring new trials; Ruling involves cases in which police tell alleged victim's story

By Bob Egelko, Chronicle Staff Writer

[San Francisco] – In a ruling that could affect some cases in California and other Western states, a federal appeals court Tuesday allowed prisoners to seek new trials if their alleged victims' statements were introduced at trial through police testimony.

The U.S. Supreme Court ruled last March that such hearsay testimony – an officer's secondhand account of a witness' accusation – violates the constitutional right to confront and cross-examine one's accusers. On Tuesday, the Ninth U.S. Circuit Court of Appeals in San Francisco said the high court's ruling applied retroactively to state prisoners who still had appeals pending in federal court.

“Where ... evidence is unreliable, the accuracy of convictions is seriously undermined,” said Judge Margaret McKeown in a 2-1 ruling granting a new trial to a Las Vegas man who has spent more than 16 years in prison on a child sexual abuse conviction. She said the Supreme Court's chief concern with so-called testimonial hearsay was the unreliability of statements that have not been subjected to cross-examination.

The Supreme Court did not say whether its ruling was retroactive but has declared previously that new rulings in criminal cases would apply only to future cases unless they were watershed decisions that undermined the accuracy of past convictions.

Using that standard, three federal appeals courts ruled last year that the high court's March 2004 decision was not retroactive. The Ninth Circuit, the nation's largest, oversees federal courts in California and eight other states.

Nevada Deputy Attorney General Victor-Hugo Schulze said the state would probably appeal Tuesday's ruling, either to a larger panel of the appeals court or directly to the Supreme Court.

Schulze said the defendant, Marvin Bockting, had properly been convicted of sexual abuse and sentenced to life in prison in 1988 under the legal standard in effect at the time. The ruling, if upheld, will primarily affect cases that rely on testimony by children, the frail elderly and battered spouses, people who “freeze on the (witness) stand based on fear,” Schulze said.

But federal Public Defender Franny Forsman, who is Bockting's attorney, said the ruling should increase public confidence in the results of trials.

"We can't have confidence in verdicts unless witnesses are required to testify and defendants are able to confront them," she said, adding that she believed Bockting's claim of innocence.

Bockting was convicted of sexually abusing his 6-year-old stepdaughter. The girl awoke crying one night and told her mother that Bockting had forced her into sexual acts, and she repeated the accusation to a detective several days later. A medical examination was consistent with her allegations, but she was too upset to testify in court. The judge then allowed the officer to repeat the girl's statements to the jury, which convicted Bockting.

The appeals court overturned the conviction, saying the testimony was critical and violated the Supreme Court's new standard. If Bockting is retried, the alleged victim could testify against him.

Before the Supreme Court's ruling last March, such hearsay evidence was allowed in many states, including California, where laws have allowed police to relay the words of traumatized victims to juries in cases of elder abuse, childhood sexual abuse and domestic violence.

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